Dec 26, 2000

No. 99-7791

IN THE
# Supreme Court of the United States

KESTUTIS ZADVYDAS,
*Petitioner,*

v.

LYNN UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether the Immigration and Naturalization Service's (INS) continued detention of a criminal alien who is subject to a final order of deportation but whose deportation cannot be effectuated immediately, violates substantive due process, where the alien's custody is reviewed automatically by the INS on a periodic basis to determine whether he would present a danger to society or a flight risk if released.

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## BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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### INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center[1] with supporters in all 50

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed (continued...)

states. WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other federal courts to combat illegal immigration and to ensure that aliens who engage in criminal activities are excluded from American society. *See, e.g., Reno v. American-Arab Anti-Discrimination Committee,* 119 S. Ct. 936 (1999); *Ogbomon v. United States,* 519 U.S. 1073 (1997); *Immigration and Naturalization Service v. Elramly,* 518 U.S. 1051 (1996). WLF also filed a brief in support of the certiorari petition filed by the federal government in *Reno v. Ma*, No. 00-38, the case that has been consolidated with this case.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* before the Court on immigration-related issued on a number of occasions.

As a result of the district court's decision in this case, a criminal alien at this moment is walking freely on the nation's streets, despite having been convicted of serious felonies, despite being subject to a final order of deportation, and despite repeated INS determinations that he is a danger to the community. Moreover, as Respondents' brief notes, hundreds of other dangerous criminal aliens may also soon be foisted on the public as a result of the Ninth Circuit's decision in *Ma v. Reno,* 208 F.3d 815 (9th Cir. 2000), *certiorari granted*, ___

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[1](...continued)
monetarily to the preparation and submission of this brief.



U.S. ___, 69 U.S.L.W. 3257 (Oct. 10, 2000). *Amici* are filing an *amicus curiae* brief in this case because they fear for the public safety if the Fifth Circuit's decision is not allowed to stand.

*Amici* have long been involved in efforts to protect the general public from criminal activity and to promote the rights of those who fall victim to crime. The district court's decision and the Ninth Circuit's *Ma v. Reno* decision discuss at great length the alleged rights of convicted felons, but do not seem to have taken into account the rights of those who are threatened by Kestutis Zadvydas's and Kim Ho Ma's continued presence in American society.

*Amici* are filing this brief with the consent of all parties. Letters of consent have been lodged with the Court.

## STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby adopt by reference the Statement contained in Respondents' brief.

In short, Petitioner Kestutis Zadvydas is a 52-year-old alien who has spent virtually his entire life either engaged in criminal activity or serving time in prisons as a result of his repeated criminal convictions.[2] Because of that criminal

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[2] Mr. Zadvydas's criminal career includes: (1) juvenile convictions for car theft in 1964 and trespass in 1965; (2) a six-year sentence in 1966 in New York for attempted robbery; (3) a 1973 conviction for auto theft; (4) a 1-1/2 to 3-year sentence in 1974 in New York for attempted burglary; (5) punishment for escaping from prison while serving the 1974 sentence; (6) his status from 1987 to 1992 as a
(continued...)

activity, he is subject to a final deportation order issued by the INS and has exhausted all appeals. Mr. Zadvydas has been unable to find a country willing to accept him. Accordingly, he argues that he has a substantive due process right to remain free in American society until such time as he can find another country willing to tolerate his presence.

The Respondent in No. 00-38, Kim Ho Ma, is a 23-year-old Cambodian national who has been a permanent resident of the United States since 1987. In April 1995, Ma, along with four other gang members, ambushed and shot a fellow gang member and left him to bleed to death. Ma was arrested and charged with murder. At his 1996 trial, the jury could not reach a verdict on second-degree murder charges and convicted Ma of first-degree manslaughter. *Reno v. Ma* Petition Appendix ("*Ma* Pet. App.") 56a. Ma was not retried on the second-degree murder charge. As a result of his homicide conviction, Mr. Ma is also subject to a final order of deportation, but to date Cambodia has been unwilling to accept his return. He too argues that he has a right to remain free in American society indefinitely, until such time as Cambodia approves his return.

**Proceedings Below.** Mr. Zadvydas was taken into custody by the INS in January 1994 following his release on parole by Virginia penal authorities. Petition Appendix B;

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[2](...continued)
fugitive from justice -- he fled Virginia in 1987 to avoid prosecution on drug charges; and (7) a 16-year sentence in 1992 in Virginia for possession of one-half kilogram of cocaine with intent to distribute.



*Zadvydas v. Underdown*, 185 F.3d 279, 283 (5th Cir. 1999).[3] He had served less than two years on his 16-year sentence for drug trafficking. An immigration judge issued a deportation order in March 1994, finding that Mr. Zadvydas was deportable as an alien who had, *inter alia*, been convicted of an aggravated felony. *Id.* Mr. Zadvydas then applied for a waiver of deportation under 8 U.S.C. § 1182(c). An immigration judge denied the application, noting Mr. Zadvydas's lengthy criminal career and the extensive steps he had taken to avoid the INS's deportation efforts in the 1970s. *Id.* Mr. Zadvydas did not appeal from that denial, and does not now contest that he is subject to a final order of deportation. Mr. Zadvydas remained thereafter in INS custody as the INS attempted to arrange his deportation.[4]

This action began in September 1995, when Mr. Zadvydas filed a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Louisiana, claiming that his continued detention violated the Eighth Amendment, due process, and international law. *Id.* at 284. On October 30, 1997, the district court granted the petition,

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[3] References herein to the lower-court decisions are to the West citations, not to the Petition Appendix or to the Joint Appendix.

[4] The INS's difficulties in arranging deportation are set out fully in Respondents' brief. In short, Mr. Zadvydas's citizenship is a matter of some dispute. One undisputed fact is that Mr. Zadvydas is not now, nor has he ever been, an American citizen. He was born in a displaced persons camp in Germany following World War II, the child of parents of Lithuanian ancestry. His parents were born in a region which, at various times, has been under the control of Germany, Lithuania, and Russia. Despite continuing good-faith efforts by the INS, it has been unable to date to arrange for one of those three countries to accept Mr. Zadvydas.

finding that continued detention violated Mr. Zadvydas's rights to substantive due process. Pet. App. A; *Zadvydas v. Caplinger*, 986 F. Supp. 1011 (E.D. La. 1997). The court held that the INS was acting within its statutory authority in holding Mr. Zadvydas for 3 1/2 years following issuance of a final deportation order. *Id.* at 1024. The court nonetheless ordered his release because, the court found, there was no possibility that he would ever be deported and because such "permanent confinement" was inconsistent with his substantive rights under the due process clause. *Id.* at 1026.

The Fifth Circuit reversed. 185 F.3d 279. The court noted that under § 305(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[5] the INS may at its discretion detain indefinitely an alien awaiting deportation/removal if he (as is true of Mr. Zadvydas) is subject to deportation by virtue of having been convicted of an "aggravated felony." *Id.* at 286.[6] The court further noted that the INS has issued regulations stating that it will periodically review the status of all detained aliens who have not been deported within the 90-day "removal period" following issuance of a final deportation order, and that it will release any such alien when it is determined that the alien is not a threat to the community and is likely to comply with the

[5] Section 305(c) was codified as § 241(a)(6) of the Immigration and Naturalization Act, 8 U.S.C. § 1231(a)(6).

[6] The issue of whether IIRIRA § 305(c) does, in fact, permit *indefinite* detention of certain aliens was not addressed by the appeals court. Despite the limited nature of the Question Presented, Mr. Zadvydas now asserts that the INS is *not* authorized under § 305(c) to continue any detentions for more than a short period after a final order of deportation has been issued.



appeals court held, Mr. Zadvydas's continued detention did not violate his substantive due process rights. *Id.* at 288-97. The court said that the detention could not be deemed "indefinite" or "permanent" because: (1) the INS would release Mr. Zadvydas as soon as it determines that he no longer poses a danger to the community and a flight risk; and (2) there was at least a possibility that the INS's continuing efforts to find a country willing to accept Mr. Zadvydas would eventually bear fruit. *Id.* The court said that the infringement on Mr. Zadvydas's liberty "is currently within the core area of the government's plenary immigration power and thus does not violate substantive due process." *Id.* at 294.[7] Mr. Zadvydas has nonetheless remained at liberty pending a decision from this Court.

The Court granted review both in this case and in No. 00-38 on October 10, 2000, and consolidated the cases.

[7] In No. 00-38, the U.S. District Court for the Western District of Washington held, on substantially similar facts, that Mr. Ma's continued detention violated his substantive due process rights. *Ma* Pet. App. 55a-61a. The district court ordered his release from INS custody on September 29, 1999. The U.S. Court of Appeals for the Ninth Circuit affirmed, on nonconstitutional grounds. *Id.* at 1a-33a. The appeals court stated that it seriously questioned whether 8 U.S.C. § 1231(a)(6) could pass constitutional muster if it were interpreted as permitting detention of removable aliens for an indefinite period of time following the removal period. *Id.* at 22a. Applying the doctrine of constitutional doubt, the court interpreted § 1231(a)(6) as allowing the INS to detain a removable criminal alien for only a "reasonable time" beyond the removal period. *Id.* at 25a-26a. When there is no reasonable likelihood that removal can be effected "in the near future," *no* detention following completion of the 90-day removal period is permitted, the court ruled. *Id.*

## SUMMARY OF ARGUMENT

The continued detention of criminal aliens shown to pose a risk to public safety, during the time it takes to effect their deportation pursuant to a final deportation order, does not violate their substantive due process rights. Such aliens' liberty interests in being free from detention during that period are far outweighed by the public's interest in being protected from criminal activity. Although one can never know with absolute certainty that a particular criminal alien will renew his criminal activities if released pending deportation, it is a statistical certainty that a significant percentage of criminal aliens who are subject to a final order of removal will, if released, engage in criminal activity.

Mr. Zadvydas's substantive due process claims are foreclosed by this Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Although the alien in *Mezei* was an excludable alien who was being denied permission to re-enter the country while Mr. Zadvydas is a former resident alien who is subject to a deportation order, that distinction is irrelevant for purposes of substantive due process analysis.

Mr. Zadvydas's statutory claim is equally lacking in merit. The statute at issue, 8 U.S.C. § 1231(a)(6), plainly authorizes the INS to detain a criminal alien for an indefinite period following issuance of a final deportation order.



## ARGUMENT

### I. CRIMINAL ALIENS WHO HAVE BEEN ORDERED REMOVED FROM THE COUNTRY HAVE NO DUE PROCESS RIGHT TO REMAIN AT LIBERTY WITHIN AMERICAN SOCIETY DURING THE TIME IT TAKES TO EFFECT REMOVAL

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the federal government may take an action depriving a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

But the Court has recognized that the Due Process Clause also includes a categorical prohibition against certain extreme forms of government conduct that result in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due process," "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952), and *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937)). *Amici* submit that there is nothing "shock[ing to] the conscience" about a law that permits the federal government to protect its citizens by detaining those aliens who have been convicted of aggravated felonies, have been ordered removed from the country, and have been determined to constitute "a risk to the community"

if released from detention during the period necessary to effect their removal.

*Amici* recognize that individual liberty is a value deeply rooted in American society. Nonetheless, the federal and state governments have regularly countenanced significant restraints on individual liberty where society's interests in imposing such restraints have been deemed sufficiently weighty. No one seriously questions, for example, that government may constitutionally incarcerate those found to have violated the criminal laws, or that government has broad discretion to define what constitutes criminal conduct.

In the civil context as well, the Court has regularly upheld the government's power to require the sacrifice of individual liberty for the sake of the common good. For example, in *Arver v. United States,* 245 U.S. 366 (1918), the Court rejected claims that conscription into the armed forces violated substantive due process, even in times of war. The Court has also upheld compelled vaccinations designed to promote the public health, despite objections that vaccinations can result in permanent injury and death. *Jacobson v. Massachusetts,* 197 U.S. 11 (1905). The Court explained:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.



*Id.* at 26. *Jacobson* also recognized the right of government to hold citizens in quarantine against their will in order to prevent the spread of disease. *Id.* at 29. *See also O'Connor v. Donaldson,* 422 U.S. 563, 582-583 (1975) (Burger, C.J., concurring) ("There can be little doubt that in the exercise of its police powers a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.").

Given that protecting citizens from crime is one of the most important functions of government, there could be little justification for prohibiting governments from imposing reasonable restraints on individual liberty in order to carry out that function. As the Court recognized in *Schall v. Martin,* 467 U.S. 253 (1984), "The 'legitimate and *compelling* state interest' in protecting the community from crime cannot be doubted." *Schall,* 467 U.S. at 264 (quoting *De Veau v. Brainsted,* 363 U.S. 144, 155 (1960)) (emphasis added). *Schall* rejected a substantive due process challenge to a New York law that permitted pre-trial detention of those charged with juvenile offenses.

The Court has recognized that determining how far government may go in sacrificing individual liberty in pursuit of the common good entails a balancing process:

> In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and the "demands of organized society." *Poe v. Ullman,* 367 U.S. 497, 542 (1961)(Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty.

*Youngberg v. Romeo,* 457 U.S. 307, 320 (1982).

When that balancing process is undertaken within the context of immigration matters, the balance tilts decidedly in favor of upholding federal restraints on the liberty of noncitizens imposed in the name of national security and safety.

In fact, the law is quite clear that when it comes to matters of immigration policy, the judicial branch has a very limited role to play. As the Court has repeatedly stated, "The power to regulate immigration -- an attribute of sovereignty essential to the preservation of any nation -- has been entrusted by the Constitution to the political branches of the Federal Government." *United States v. Valenzuela-Bernal,* 458 U.S. 858, 864 (1982). As a result, the Court has "underscore[d] the limited scope of judicial inquiry" into immigration-related matters. *Fiallo v. Bell,* 430 U.S. 787, 792 (1977). "The power over aliens is of a political character and therefore subject only to narrow judicial review." *Hampton v. Mow Sun Wong,* 426 U.S. 88, 101 n.21 (1976). *Accord, Miller v. Albright,* 118 S. Ct. 1428, 1447 (1998) (Scalia, J., concurring) ("Judicial power over immigration and naturalization is extremely limited.").

As the Court has explained:

> "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."



*Mathews v. Diaz,* 426 U.S. 67, 81 n.17 (1976) (quoting *Harisiades v. Shaughnessy,* 342 U.S. 580, 588-89 (1952)).

The INS has determined that Mr. Zadvydas and Mr. Ma should be removed from the country, and it is undertaking efforts to effect those removals. It has further determined that release of either man from detention entails a risk to public safety. It cannot seriously be argued that the latter determination is clearly erroneous, given Mr. Zadvydas's life-long criminal career and Mr. Ma's status as a convicted killer with continued ties to a street gang. In light of the judiciary's extremely limited role in immigration matters, there can be little justification for interfering with the INS's decision that Mr. Zadvydas's and Mr. Ma's due process interests in being free from detention are outweighed by society's public-safety interest in removing them from the streets. It is no answer to assert, as does Mr. Zadvydas, that the Due Process Clause would not permit his detention under these circumstances if he were an American citizen. The fact remains that he is not a citizen, but is an alien who has been convicted of aggravated felonies and who, after a full and fair hearing, has been determined by the INS to be unfit to remain in this country. As the Fifth Circuit recognized, this Court repeatedly has upheld the federal government's power to impose restrictions on aliens "that would be intolerable if applied to citizens." 185 F.3d at 289. *See, e.g., Mathews v. Diaz,* 426 U.S. at 81 ("In the exercise of its broad powers over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

Nor can Mr. Zadvydas's case be decided in a vacuum. The decision in this case is likely to affect hundreds if not thousands of cases involving criminal aliens who are subject to final deportation/removal orders but whose removal, for a

variety of reasons, cannot be effected in the immediate future. The impact to date has been most pronounced within the Ninth Circuit, which ruled (in the decision under review in No. 00-38) that such criminal aliens may not be detained for more than 90 days after the order of removal has become final. As of the date it filed its petition in No. 00-38, the INS had appeals pending in 59 Ninth Circuit cases in which criminal aliens had been ordered released from detention under circumstances similar to Mr. Zadvydas's and Mr. Ma's, and was preparing to file notices of appeal in another 40 cases. *Ma* Pet. 15. Moreover, as of that date there were 400 other cases raising similar challenges to detention in various district courts in the Ninth Circuit. *Ma* Pet. 16. One can expect that each of those criminal aliens will be released from detention, as will numerous other criminal aliens in each of the other circuits, if the Court upholds Mr. Zadvydas's substantive due process claims.

It is no answer to such concerns to assert that no one can be certain that Mr. Zadvydas, Mr. Ma, and similarly situated criminal aliens will continue their lives of crime if released into society. *See, e.g.*, Dist. Ct. Opinion in No. 00-38, *Ma* Pet. App. 60a (the government "has failed to advance a single reason for its belief that [Mr. Ma] is a danger to society, beyond the simple fact of his conviction."). To the contrary, it is a *statistical certainty* that a significant percentage of criminal aliens who are subject to a final order of removal will, if released, engage in criminal activity.

A recent major study of criminal aliens conducted by Los Angeles County concluded that a significant percentage of deportable aliens released from jail are rearrested within one year, before their deportation can be effected. Los Angeles Countywide Criminal Justice Coordination Committee,



"Impact of Repeat Arrests of Deportable Aliens in Los Angeles County" [hereinafter, "Impact"], July 15, 1992. The study traced the activity of 1,875 inmates released from Los Angeles County jail in May 1990 who had been identified by the INS as "deportable aliens." Of those 1,875, 772 had been rearrested *within one year* (40%), and those 772 had been arrested a total of 1,522 times. Impact at iv. Moreover, those figures likely considerably understate the rearrest rate, because 974 of the 1,875 criminal aliens were actually deported at or soon after the time of their release. *Id.* If those 974 individuals are eliminated from the study on the assumption that they were not on the streets long enough prior to deportation to have been arrested, then the actual one-year rearrest rate rises to 86% (772 out of 901).

Recent congressional hearings have focused on high recidivism among criminal aliens released by the INS. INS Commissioner Doris Meissner testified at a March 2000 hearing of the House Appropriations Subcommittee on Commerce, Justice, State and the Judiciary that between October 1994 and May 1999, the INS released 35,318 criminal aliens rather than detaining them pending deportation. Ms. Meissner testified that 11,605 of those released have gone on to commit "serious crimes," including at least 1,376 who committed "violent crimes." M. Hedges, "Criminal Aliens Often Released Instead of Deported," Scripps Howard News Service, March 9, 2000. Those 1,376 individuals committed a total of 1,845 violent crimes, including 98 homicides, 142 sexual assaults, 44 kidnappings, 346 robberies, and 1,214 assaults. *Id.*

Moreover, Mr. Zadvydas's substantive due process claims are foreclosed by the Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). In

*Mezei*, the Court rejected a substantive due process challenge to the continued detention of an alien who had been deemed "excludable" by the INS but who remained "stranded in his temporary haven on Ellis Island because other countries will not take him back." *Mezei,* 345 U.S. at 207. The Court rejected the challenge despite Mr. Mezei's lack of a criminal record, despite the INS's refusal to reveal the evidence which caused it to determine that the alien was "excludable," and despite the Court's recognition "[t]hat exclusion by the United States plus other nations' inhospitality results in present hardship." *Id.* at 216. The Court explained:

> Whatever our individual estimate of that policy and the fears on which it rests, respondent's rights to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate.

*Id.* If Mr. Mezei's substantive due process concerns were insufficient to warrant judicial interference with the INS's decision to detain him, then surely there can be no constitutional basis for overturning the INS's decision that Mr. Zadvydas, Mr. Ma, and other similarly situated aliens -- who have been convicted of aggravated felonies and who have been adjudged a risk to public safety -- should be detained while efforts to effect their deportation are ongoing.

In an effort to distinguish *Mezei*, Mr. Zadvydas points out that he is not an excludable alien. Rather, he has lived in the United States for more than four decades. Pet. Br. 24-25. That distinction is of no moment. Nothing in *Mezei* suggests that the Court viewed Mr. Mezei's status as an excludable alien rather than as a deportable alien as determinative of his substantive due process claims. More importantly, there is no



rational reason to make such a distinction. As noted above, the substantive due process decision entails a balancing of society's interests in excluding a criminal alien from American society against the criminal alien's liberty interest in avoiding detention. Neither of those interests is dependent on whether the criminal alien happens to be excludable or deportable. In either instance, the INS has an equally strong interest in keeping out of American society all criminal aliens -- whether excludable or deportable -- who pose a risk to public safety. Likewise, a criminal alien who has been adjudged unworthy of being a part of American society has the same liberty interest in being free from detention regardless whether that adjudication took the form of an exclusion order or a deportation order.[8]

Any claim that Mr. Zadvydas's many years in this country have somehow earned him the right to heightened substantive due process rights -- even after his own criminal conduct has led to the forfeiture of all his rights to remain in the United States -- is undermined by the facts of *Mezei*. Mr.

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[8] Case law indicates that aliens (such as Mr. Zadvydas) already present in the United States have available to them *procedural* due process rights unmatched by those seeking to enter the United States for the first time. Procedural due process demands that those present in the United States may not be deported without being afforded a fair hearing on any claim that they are not subject to deportation. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). In contrast, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Id.* But once an alien residing in this country has received a fair hearing and has been determined to have no further rights to remain in American society, there are no logical distinctions between that alien and another alien who has never been admitted. Each has an equally strong liberty interest in avoiding INS detention.

Mezei had lived a crime-free life in the United States from 1923 to 1948 and had been out the country for only 19 months when he was denied re-entry. Yet, nothing in the Court's opinion suggests that Mr. Mezei's substantive due process rights were deemed to have been enhanced by his long-time residency. There is no greater reason to suppose that Mr. Zadvydas's long-term residency should justify an enhancement of his substantive due process rights.

*Amici* do not mean to suggest that Mr. Zadvydas is not entitled to substantive due process protections. To the contrary, the Court has never indicated that the Constitution's protections are limited to citizens and legally-admitted resident aliens. Obviously, for example, the INS in not free to torture aliens in its custody. Moreover, since the INS's sole reasons for detaining Mr. Zadvydas are to protect public safety and to ensure that he can be located when deportation arrangements are made final, the balancing process required by the Due Process Clause would appear to preclude INS measures designed solely for purposes of punishment. *See Wong Wing v. United States*, 163 U.S. 228 (1896) (due process prohibits imposing a sentence on illegal resident aliens, outside of the normal criminal law process, of one year at hard labor prior to their deportation). But nothing in the case law suggests that Mr. Zadvydas's detention, when effected for the purpose of protecting public safety, violates his substantive due process rights. *Amici* note that, in a very real sense, Mr. Zadvydas holds the keys to the jailhouse door. All he need do is find a country willing to accept him, and the INS's interest in detaining him will completely disappear. Of course, as Mr. Zadvydas himself points out, his own bad behavior makes it less likely that another country will be willing to accept him. Pet. Br. 20-21. But surely, he should not be permitted to turn his own criminal conduct to his advantage by arguing that the



United States should be forced to accept him because his conduct may have disqualified him from being accepted elsewhere.

Finally, Mr. Zadvydas argues that the Court should not in this case display its usual deference to the political branches, because (he asserts) there are no real foreign relations issues at stake. He argues that this case presents "an issue of crime control, not of national sovereignty." Pet. Br. 26. But the political branches have reached a contrary conclusion, and it is not the role of the courts to second-guess that conclusion. The INS argues that a policy of permitting criminal aliens in Mr. Zadvydas's position to be free from detention pending deportation will have a detrimental effect on the willingness of foreign countries to take back their nationals. They may well, the INS argues, be more willing to do so if they realize that their intransigence will result in their nationals languishing in detention for extended periods. Moreover, as the Court recognized in *Mezei*, "Congress may well have felt that other countries ought not shift the onus on us; that an alien in [Mr. Mezei's] position is nc more ours than theirs." *Mezei*, 345 U.S. at 216. The Constitution grants to the political branches, not to the Courts, the resolution of those types of foreign policy issues.

In sum, the INS has not violated the substantive due process rights of Mr. Zadvydas in determining, due to the risk he poses to public safety and the unlikeliness that he would comply voluntarily with a removal order, that he should be detained pending removal.

## II. SECTION 1231(a)(6) PERMITS ZADVYDAS'S DETENTION FOR AN INDEFINITE TIME BEYOND THE REMOVAL PERIOD

In denying Mr. Zadvydas's substantive due process claim, the Fifth Circuit held that the INS possessed statutory authority to detain him. Indeed, the Fifth Circuit did not treat that issue as disputed by the parties. Moreover, Mr. Zadvydas's certiorari petition did not list that statutory issue as one of the Questions Presented by the petition. Mr. Zadvydas nonetheless makes that statutory claim in its brief on the merits.

Assuming that the issue has properly been raised, Mr. Zadvydas's claim is without merit. The plain language of the relevant statute, 8 U.S.C. § 1231(a)(6), provides the INS with all the statutory authority it needs. Although the Ninth Circuit reached a contrary conclusion in the case at issue in No. 00-38, that conclusion was based on a misreading of the statute and relevant case law.

Section 1231(a)(6) provides that any removable alien who (such as Mr. Zadvydas) has been convicted of an "aggravated felony" "may be detained beyond the [90-day] removal period" by the INS. The Ninth Circuit correctly noted that the provision does not specify a time limit on the length of any detention following expiration of the removal period. But the Ninth Circuit drew an unwarranted conclusion from the absence of a time limit; it concluded that one could draw no inference regarding congressional intent from the absence of a time limit. *Ma* Pet. App. 10a. The court thought the statutory language could equally plausibly be read as authorizing detentions to continue indefinitely, "for a reasonable time," or some other temporal measure. *Id.* The



language of § 1231(a)(6) cannot plausibly be read in that manner. When a statute authorizes a government agency to do something under specified circumstances (*e.g.*, detain removable aliens who have been convicted of an aggravated felony), there is no reason to infer a congressional limit on the period of time within which the agency is authorized to act, in the absence of language imposing such a time limit.

Such an inference is particularly unjustified in the case of § 1231(a)(6). Congress authorized the detention, beyond the 90-day removal period, of removable aliens who have committed an aggravated felony because of a concern that such felons would commit other crimes if released. That concern does not lessen simply because one month, six months, or six years have elapsed since the expiration of the removal period. Accordingly, there is *no* reason to infer that Congress intended to impose a time limit on the detention of such removable aliens.

In any event, the INS's conclusion that § 1231(a)(6) authorizes indefinite detentions is a plausible interpretation of that statute. The INS's conclusion is entitled to deference, particularly in light of the broad powers granted to the political branches of government in immigration-related matters. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Ninth Circuit concluded that such deference is unwarranted in cases in which the doctrine of "constitutional doubt" arises. *Ma* Pet. App. 10a n.13. But that conclusion robs the political branches of the broad discretion they are due regarding immigration policy. The Court has made plain that the deference to which the political branches of government are entitled extends not merely to the interpretation of ambiguous statutes but also to the drawing of

lines between constitutional and unconstitutional government policy. For example, the Court has long held that immigration-control personnel are not held to the same constitutional standards as other law enforcement officials. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (denying a Fourth Amendment challenge to Border Patrol highway checkpoints at which cars were randomly stopped even in the absence of individualized suspicion of criminal activity; the need to secure areas near the border outweighs citizens' Fourth Amendment interest in not being stopped). *See also, INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (exclusionary rule does not bar use at deportation hearing of admissions made by alien following illegal arrest).

The INS's interpretation of § 1231(a)(6) is also entitled to deference because the INS is exercising its detention authority far more sparingly than the plain language of the statute would allow. On its face, § 1231(a)(6) permits the INS to detain beyond the removable period *any* removable alien who has committed an aggravated felony. However, the INS has issued regulations making clear that the only such removable aliens who will be subject to indefinite detention are those who are also determined to be a risk to the community or unlikely to comply voluntarily with the order of removal, and that any detained alien is entitled to periodic review of such determinations. 8 C.F.R. §§ 241.2 and 241.4. In other words, the INS has chosen voluntarily to limit use of its indefinite detention powers to those aliens with respect to whom society's rationale for detention is strongest. The Ninth Circuit's conclusion that Congress could not possibly have intended such a result (*Ma* Pet. App. 24a), even though that result is consistent with the statutory language and directly serves society's interests, is without merit.



Moreover, as the INS has pointed out, § 1231(a)(6) as interpreted by the Ninth Circuit would constitute a substantial restriction on the INS's previously existing detention powers. Yet § 1231(a)(6) was adopted in September 1996 as part of IIRIRA, Pub. L. 104-208, a law designed to hasten the removal of illegal aliens and to protect citizens from alien criminals.[9] In order to spur speedier removal of such aliens, IIRIRA reduced the "removal period" (the period within which the INS is expected to effect removal following a final deportation/ removal order) from six months to 90 days. It is highly unlikely that such a law would have been a vehicle for Congress to decrease the INS's powers to detain removable aliens pending removal. But that is the effect of Mr. Zadvydas's argument; he insists that Congress intended to hasten the return to American society of those criminal aliens subject to removal whose removal cannot, for whatever reasons, be effected at once.

The Ninth Circuit's and Mr. Zadvydas's reading of § 1231(a)(6) would produce another anomalous result as well. As part of IIRIRA, Congress adopted 8 U.S.C. § 1226(c), which absolutely requires the detention of "criminal aliens" against whom removal proceedings are pending.[10] Yet, if Mr.

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[9] *See, e.g.*, Senate Committee on Government Operations, "Criminal Aliens in the United States," 104 S. Rpt. 48 (April 7, 1995) (recommending legislation to ensure increased detention of alien criminals prior to deportation).

[10] Section 1226(c)(1)(B) states that the INS "*shall* take into custody any alien who . . . is deportable by reason of having committed any offense covered in section . . . 237(a)(2)(A)(iii)." Section 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), provides for the removal of any alien convicted of an "aggravated felony" at any time

(continued...)

Zadvydas's interpretation were adopted, one would have to ascribe to the same Congress that mandated detention of criminal aliens against whom removal proceedings are pending a desire to mandate release of such aliens a mere 90 days after a removal/deportation order becomes final. It is highly unlikely that Congress could have entertained two such conflicting desires. After all, there is *more* reason to support the detention of a criminal alien after he has been determined to be deportable than before the determination has been made, when there is still a possibility that the deportation proceedings have been initiated in error. Yet, under Mr. Zadvydas's interpretation, one is forced to conclude that Congress adopted precisely the opposite reasoning.

Finally, Mr. Zadvydas insists that Congress has had a long tradition of *requiring* the release of deportable aliens whose deportation cannot be effected within a reasonable time, regardless how grave the threat that the alien may pose to public safety. Pet. Br. 31-36. The evidence does not support Mr. Zadvydas's interpretation. For example, Mr. Zadvydas argues that from 1950 to 1990, federal immigration law imposed a strict six-month limit on detention of deportable aliens following a final deportation order. Pet. Br. 33-34. That argument is a misreading of the relevant statute, 8 U.S.C. § 1252 (repealed in 1996); there was no such strict limit on detention. Former § 1252(c) provided that the Attorney General had a six-month period following entry of a

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[10](...continued)
after admission. Mr. Zadvydas does not contest that he has been convicted of an "aggravated felony" within the meaning of the statute. Aliens detained pursuant to § 1226(c)(1) may not be released during the pendency of deportation proceedings, except under very limited circumstances (*see* § 1226(c)(2)) not relevant to this case.



final deportation order during which to effect an alien's deportation. During that period, the Attorney General had discretion to detain the deportable alien, *regardless* whether he had been convicted of any crime. Former § 1252(c) further provided:

> If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section.

Mr. Zadvydas asserts that the quoted language acted as an absolute prohibition against any detention beyond the six-month period, because such post-six-month detention is not "authorized" anywhere in § 1252. That assertion is a clear misreading of the statute. Section 1252(c) "authorize[s]" detention of aliens subject to final deportation orders; accordingly, the language quoted above permitted detention to continue even after the six-month period had expired.[11]

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[11] Mr. Zadvydas's interpretation of former § 1252(c) would render nonsensical the quoted language regarding "such further supervision *and detention*." (Emphasis added.) What would have been the point of Congress including the "and detention" language if Congress did not also intend to permit detention beyond the six-month period in at least some circumstances? Mr. Zadvydas has cited one appeals court decision in support of its interpretation. *Johns v. Department of Justice*, 653 F.2d 884, 890 (5th Cir. 1981). Suffice to say that this Court never endorsed the quizzical interpretation of former § 1952(c) espoused by Mr. Zadvydas.

Moreover, it is uncontested that at least since 1988, Congress had repeatedly adopted measure designed to ensure that the INS was authorized, at its discretion, to detain criminal aliens subject to a final deportation order, regardless of the amount of time that had elapsed after entry of the order. Indeed, as Mr. Zadvydas concedes, for a brief period in 1996, the INS was absolutely *required* to detain aggravated felons who were subject to a final deportation order, regardless of the amount of time that had elapsed following entry of the order. Pet. Br. 35. Against that backdrop, it is highly unlikely that Congress, when it adopted IIRIRA in 1996, would have wanted to reverse course dramatically by imposing strict limits on the duration of detention following entry of a final deportation order.

In sum, the only plausible interpretation of 8 U.S.C. § 1231(a)(6) is that Congress intended thereby to permit the INS to continue to detain deportable/removable criminal aliens for an indefinite period of time following expiration of the 90-day removal period.



## CONCLUSION

*Amici curiae* Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court affirm the court of appeals's decision.

Respectfully submitted,

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